

UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
STATUS CONFERENCE

IN THE MATTER OF: :
: Docket No.
Scheduling 4-OH-DiPT, : 22-15
5-MeO-AMT, 5-MeO-MiPT, :
5-MeO-DET, and DiPT :
:
:

Monday,
July 11, 2022

Videoconference

The above-entitled matter came on for
hearing, pursuant to notice, at 1:00 p.m.

BEFORE: THE HONORABLE TERESA A. WALLBAUM,
Administrative Law Judge

APPEARANCES:

On Behalf of the Government:

DAVID M. LOCHER, ESQ.

PAUL DEAN, ESQ.

ANDREW T. WINKLER, ESQ.

of: Drug Enforcement Administration
Office of the Chief Counsel
8701 Morrisette Drive
Springfield, Virginia 22152
571-362-7022
david.m.locher@dea.gov
andrew.t.winkler@dea.gov

On Behalf of the Interested Parties:

Mindstate and Tactogen:

MATTHEW C. ZORN, ESQ.

of: Yetter Coleman, LLP
811 Main Street
Suite 4100
Houston, Texas 77002
713-632-8000
mzorn@yettercoleman.com

Jason Wallach and Hamilton Morris:

JOHN T. HUNTER, ESQ.

of: Hunter, Lane & Jampala
Tower Life Building
310 S. St. Mary's Street
Suite 1740
San Antonio, Texas 78205
210-202-1076
john@hljdefense.com

Panacea Plant Sciences:

DAVID HELDRETH, pro se

of: Panacea Plant Sciences
14321 SE 49th Street
Bellevue, Washington 98006
davidh@panaceaplantsciences.net

ALSO PRESENT:

ANNE COTTER, Law Clerk to Judge Wallbaum

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P-R-O-C-E-E-D-I-N-G-S

1:01 p.m.

JUDGE WALLBAUM: This is an on the
record status conference in the matter of
scheduling of five tryptamines, Docket No. 22-15.
I am the assigned Administrative Law Judge,
Teresa A. Wallbaum. Could I have appearances
from the government please?

MR. LOCHER: Yes, Your Honor. David
Locher for the government.

MR. DEAN: Paul Dean for the
government.

MR. WINKLER: And Andrew Winkler for
the government.

JUDGE WALLBAUM: All right, thank you.
For Mindstate and Tactogen?

MR. ZORN: Matthew Zorn of Yetter
Coleman LLP.

JUDGE WALLBAUM: For Wallach and
Morris?

MR. HUNTER: John Hunter with Hunter,
Lane and Jampala.

JUDGE WALLBAUM: And for Panacea?

MR. HELDRETH: David Heldreth, acting
as pro se.

1 JUDGE WALLBAUM: Thank you. So yes,
2 Mr. Heldreth is the CEO of Panacea, and he is
3 appearing pro se for the company. And just so
4 the record is clear, Mr. Dean, thank you for
5 appearing. I specifically asked for someone, a
6 supervisor for DEA to appear, and I appreciate
7 you making the time to do that.

8 The purpose of this on the record
9 status conference is narrow. On June 30th, 2022,
10 I had an off the record status conference, and
11 off the record status conferences are relatively
12 common in these proceedings especially at this
13 stage. At that status conference, I expressed my
14 frustration with the government's failure to
15 follow two of my orders.

16 An order for the disclosure of
17 materials, including noticed exhibits, and an
18 order regarding the publication of the hearing
19 date in this matter. So first for you Mr. Dean,
20 I know that Mr. Beerbower was the lead counsel is
21 no longer with DEA, which is one of the reasons I
22 asked you be here today.

23 I think I was clear in the off the
24 record status conference and Mr. Walker and Mr.
25 Winkler were there, but I am -- I wanted to

1 reiterate my frustration that the government has
2 failed to comply with two of my orders so far,
3 and in particular with the disclosure motion. As
4 I said on June 30th, the government had four
5 months to prepare, and I made it very clear they
6 should be prepared. They had four months to
7 prepare the documents.

8 It was a finite universe of documents,
9 and I made it clear given my generous amount of
10 time up front, I was not inclined to grant
11 extensions. Again, despite all of that, when it
12 came time for the document swap, the government
13 was not ready and failed to produce a number of
14 studies that the interested parties had been
15 asking for for some time.

16 And on -- and then it became apparent
17 that through email exchanges with the interested
18 parties, Mr. Beerbower offered to negotiate an
19 extension of time, but I had expressly told him I
20 would not grant that. So I know that is -- Mr.
21 Locher and Mr. Winkler were not lead counsel or
22 were not even on the case for most of that.

23 So I just wanted to reiterate for the
24 record what happened in that -- regarding that
25 order, and so there was no reason for it to

1 become so complicated, and Mr. Beerbower's
2 responsibility and explain that it was
3 negligence, that he had failed to check the email
4 and the CD for those documents, and I accept
5 that. But they really had plenty of time to
6 avoid that mistake.

7 So I hope going forward I won't have
8 that mistake again. So that's the, that's the
9 first order.

10 The second one, and I think the more
11 pressing one from my perspective is the order to
12 publish my -- the date of hearing, and this case
13 has been pending since mid-January or February
14 1st or February 2nd I believe I when I issued the
15 first OPHS. So there's been a lot of procedural
16 history. Just for your sake and for the record,
17 I'll give a little of that procedural history.

18 On April 22nd of 2022, the government
19 filed a consent motion to amend the prehearing
20 schedule, claiming that the Notice of Proposed
21 Rulemaking did not include a specific date and
22 time for the hearing in this matter to commence,
23 pursuant to 21 C.F.R. Section 1308.43, paragraph
24 (f). The government indicated that it was
25 working diligently to prepare a Notice of

1 Hearing, but it requested that this tribunal
2 vacate the prehearing deadlines to allow for
3 publication of that notice.

4 That was April 22nd. On April 26th,
5 I held a status conference and discussed it with
6 Mr. Beerbower, and explained to him during that
7 status conference that I believe that I could
8 just, if necessary, order the publication of a
9 hearing date which was, as I'm sure you know Mr.
10 Dean, the way it used to always be done until
11 relatively recently, in which now that is waived
12 in one of my prehearing orders.

13 On April 27th, I issued an order
14 denying the government's consent motion and in
15 that order I noted what I had said at the status
16 conference, which is once the merits hearing date
17 was set, I could if necessary direct the
18 government to publish a notice of that hearing
19 date in the Federal Register to resolve the
20 publication issue. That was April 27th.

21 On June 7th, I held a prehearing
22 conference. At that time, six weeks after the
23 April 27th status conference, DEA had not
24 published any Notice of Hearing, and we also had
25 not heard any dates or any information from the

1 government about what was going on. Except there
2 was one time I believe I asked my clerk to reach
3 out via email and was told that there had -- it
4 had not been published.

5 At the June 7th prehearing conference,
6 Mr. Beerbower did not inform me of any progress
7 on the matter. So on June 13th, I issued an
8 order directing the government to publish my
9 language forthwith. DEA did not file an
10 interlocutory appeal of that order or indicate in
11 any way that it disagreed with my language that I
12 ordered published. So that's the background.

13 I called the June 30th status
14 conference to address the disclosure issue, but
15 it had been two weeks since I had issued the
16 order to publish the Notice of Hearing and not
17 heard anything, so I asked Mr. Beerbower what the
18 status was, and why specifically the government
19 had not published my order.

20 Mr. Beerbower stated that he had been
21 instructed by the -- that the Administrator
22 wanted her order published first, and he made
23 clear that he meant the language DEA had
24 suggested in the April 26th status conference.
25 He said that he had been working on that language

1 ever since. It had gone through separate
2 iterations and versions, and that he had worked
3 the previous weekend to try to get it on the
4 Administrator's desk.

5 I asked him who had instructed him not
6 to comply with my order, and he said it was his
7 understanding that the instruction had come
8 directly from the Administrator. He repeated
9 that, and the second time he said "the
10 Administrator's Office," and that's my notes, and
11 Mr. Locher, you looked up if you disagree with my
12 representation. But that's what my notes say,
13 that is what my Clerk's notes say and I had the
14 same reaction as what you just had, which was
15 surprise.

16 He said the Administrator -- his
17 understanding was that it came from the
18 Administrator's office or the Administrator, and
19 that the direction was the April 26th language
20 was supposed to be published first, and then I
21 asked well what about my order, and he said if I
22 still wanted to after then, after that, I could
23 also publish my order.

24 And that is the main reason we're here
25 today, and Mr. Locher, do you dispute that that

1 what was said by Mr. Beerbower at --

2 (Simultaneous speaking.)

3 MR. LOCHER: I did not mean to look up
4 with either surprise or to disagree. That does
5 more or less accord with my recollection.

6 JUDGE WALLBAUM: Okay, thank you. I'm
7 sorry. I don't mean to impute anything to you,
8 but I just wanted to give the government a chance
9 to disagree with my recollection if you wanted
10 to. So I find that representation troubling,
11 because the government did not file an
12 interlocutory appeal of my order, and that's the
13 proper mechanism if you want the Administrator to
14 overturn something that I have ordered.

15 And again, I don't think there's any
16 -- there was no lack of clarity in what Mr.
17 Beerbower said. At a minimum, somebody from the
18 Administrator's office, if not the Administrator
19 herself, instructed CCD to take a certain course
20 of action in regard to a pending order. So
21 again, I know Mr. Beerbower is no longer with
22 DEA, but I wanted to do this on the record, and
23 Mr. Dean, I would like --

24 As the supervisor from CCD, I was
25 hoping that you could explain to me what happened

1 in terms of why DEA did not comply with my order
2 to publish my language, went with prior language
3 that I had every understanding was dead in the
4 water, and that you did so with some involvement
5 from the Administrator's office. Could you
6 explain, please expand on that?

7 MR. DEAN: Good afternoon, Your Honor.
8 I will try. I think I will somewhat limited in
9 what I can say because of attorney-client
10 privilege and just internal agency deliberations.
11 But what I can say is that the agency believes it
12 has substantially complied with your order.
13 While not the identical language, the fact of the
14 matter is almost everything in your order has
15 been published by the agency as of last week.

16 So I'll stop there, and then if you
17 would like to ask me specific questions, I will
18 attempt to answer them.

19 JUDGE WALLBAUM: Did Administrator
20 Milgram call CCD directly and give an instruction
21 to disregard my order, which was Mr. Beerbower's
22 representation?

23 MR. DEAN: Excuse me a moment, Your
24 Honor. I'm trying to make sure that anything I'm
25 saying is not privileged. I don't know exactly -

1 - I have no reason to dispute your
2 characterization of what Mr. Beerbower said. I
3 don't know that the Administrator herself called
4 Mr. Beerbower. The agency certainly expressed
5 its view that the notice already in process
6 should be done first.

7 JUDGE WALLBAUM: When you say the --
8 who expressed their view that the April, I'm
9 going to call it the April 26th language, that
10 that language was in process and should be
11 completed. Who took that view or who expressed
12 that view?

13 MR. DEAN: Your Honor, I'm not sure if
14 I can give you individual names. I can say that
15 the front office generally expressed that view.
16 But in terms of specific individuals, I am not
17 sure that I am at liberty to name names.

18 JUDGE WALLBAUM: Can you elaborate on
19 what you mean by "the front office"?

20 MR. DEAN: By the front office, I mean
21 the agency leadership, including the
22 Administrator, and my not -- so let me be clear.
23 So above Chief Counsel, we'll put it that way.

24 JUDGE WALLBAUM: I just want to be
25 clear when you -- that that position of the front

1 office was never in any way communicated to this
2 tribunal, either in an order or any of the staff
3 conferences or prehearing conferences, prehearing
4 conference singular that I held, and I had a
5 pending order.

6 I understand the position that you
7 said complied substantially with that order, but
8 it's also clear to me from Mr. Beerbower's
9 representations and your representations that you
10 weren't actually complying with my order. You
11 were complying with an April 26th version that
12 was not -- setting aside whether or not it
13 complies with my order, that was not what was
14 going on. You were complying, it sounds like, to
15 a different order, a different directive.

16 MR. DEAN: Your Honor, I respectfully
17 disagree. I think, and maybe I've misspoken or
18 not spoken clearly enough. The agency's position
19 is that they were complying with your order
20 substantially by the notice that they published,
21 which is substantially similar to your order.
22 Obviously, for example, your order is not
23 formatted these scheduling orders are usually
24 formatted and things of that nature.

25 The agency's position is that it

1 substantially complied with your order because
2 the points in your order were published in the
3 Federal Register.

4 JUDGE WALLBAUM: All right. Well
5 setting that aside, your representation just now,
6 which is consistent with Mr. Beerbower's
7 representation, was your position -- it was the
8 agency's position that the April 26th language
9 should be the one that was put in effect, and my
10 reason for this hearing today is that first of
11 all, no one communicated that to me, which is
12 unacceptable.

13 Secondly, there was no interlocutory
14 appeal, and third, there seems to be annulment
15 from the Administrator's office in a pending
16 order without an interlocutory appeal. Do you
17 see the reason for my concern with that?

18 MR. DEAN: Absolutely, Your Honor. I
19 can't speak -- sorry.

20 JUDGE WALLBAUM: No please, go ahead.

21 MR. DEAN: I can't speak to
22 necessarily why you weren't notified. I keep
23 repeating the same thing and I apologize for
24 that, but I certainly understand your concerns,
25 and I understand why you would be concerned. I

1 can just let you know that the agency believes
2 that it has substantially complied with your
3 order.

4 JUDGE WALLBAUM: And I understand that
5 you're grappling with attorney-client privilege
6 and deliberative process. I'm grappling with the
7 APA, which requires me to give the interested
8 parties a fair hearing, and I'm grappling with
9 the regulations which say that if the government
10 doesn't or any party doesn't agree with my
11 pending order, you need to take an interlocutory
12 appeal.

13 You don't get to do an ex parte
14 communication with the Administrator about a
15 pending order, and I don't know how to go forward
16 from that if you can't tell me, if you can't give
17 me any more information.

18 MR. DEAN: I don't believe I can give
19 you any further information without conferring
20 with chief counsel, but I think I can say that I
21 did not mean to suggest and I'm not suggesting
22 that the Administrator herself did something
23 here. I thought I made it clear that it was the
24 front office, and that's a collection of
25 individuals who lead the agency.

1 There is, as you're well aware, there
2 are individuals in the front office who are
3 partitioned off, so that there are no conflicts
4 of interest matters in active matters that are
5 pending. If Your Honor wanted to do some sort of
6 in camera discussion, we could perhaps go into
7 further detail. But I would again have to speak
8 with either deputy chief counsel and chief
9 counsel.

10 JUDGE WALLBAUM: Well again, my notes
11 say that Mr. Beerbower said two things. First,
12 he said Administrator. Then he said
13 Administrator's office. He didn't say front
14 office. He didn't say people surrounding the
15 Administrator, and I understand that DEA is large
16 institution and there are people that are cut
17 off.

18 But can you make a representation
19 today that whoever instructed you to not -- to
20 do, take a different path than my order is not, I
21 don't know. I think you have to make a more
22 detailed representation, that they are not going
23 to be an ultimate decision-maker in this case, or
24 involved in the decision-making in this case.

25 MR. DEAN: Yeah. I believe I can

1 represent that, Your Honor.

2 JUDGE WALLBAUM: So the -- you cannot
3 tell me who instructed you to go forward with the
4 April 26th language, or you will not?

5 MR. DEAN: I would have to confer with
6 deputy chief counsel and chief counsel as to
7 whether I could give you a name on the record,
8 Your Honor.

9 JUDGE WALLBAUM: But is your
10 representation that that person is not -- will
11 not be involved in this case after a recommended
12 decision is issued in determining the agency's
13 final ruling on the matter. Can you make that
14 representation?

15 MR. DEAN: I believe that I can, Your
16 Honor, if I'm understanding your question
17 correctly. I believe that I can, and if I find
18 out something different, I'll of course notify
19 the Court immediately. But I am comfortable
20 making that representation.

21 JUDGE WALLBAUM: So again Mr. Dean,
22 just so you understand why we're here today, I
23 don't know what happened. The parties, the
24 interested parties don't know what happened.
25 There was a representation that the Administrator

1 or the Administrator's office was involved, and
2 outside of the regulatory proceedings,
3 procedures.

4 So I have to be able to provide a fair
5 hearing, and if the person who's giving you these
6 directions is involved in the decision-making
7 process, then I think that raises a separate
8 issue. So that's why I'm asking for a clear
9 representation from the government that whoever
10 gave you the instruction to do the different
11 language is not going to be involved in reviewing
12 my recommended decision. Do you understand that?

13 MR. DEAN: I do understand it, Your
14 Honor, and I believe that's the case. I don't
15 know all the individuals involved, but I do
16 believe that's the case. That's why I said I'm
17 willing to make that representation. If I find
18 out that I am wrong, I will let you know
19 immediately.

20 JUDGE WALLBAUM: Right, and can the
21 government also make a representation that if
22 anyone from the front office gives you
23 instructions to do something differently than
24 what I've offered, that you inform the tribunal
25 of that?

1 MR. DEAN: I think we -- I think I
2 can. I don't --

3 JUDGE WALLBAUM: I need more than I
4 think I can. I need more than I think I can Mr.
5 Dean, because at a bare minimum going forward, I
6 have to know that the hearing is -- that
7 everything that's happening is happening in this
8 hearing proceeding and not in ex parte
9 communications.

10 MR. DEAN: Of course Your Honor, yes,
11 yes. I understand that and yes. We can make a
12 representation.

13 JUDGE WALLBAUM: You can make a
14 representation that if there's another direction
15 to do something differently than what my order
16 has said, that will be communicated to this
17 tribunal promptly before, so that I can inform
18 the interested parties?

19 MR. DEAN: Yes, Your Honor.

20 JUDGE WALLBAUM: I'm going to hold you
21 to that. I'm going to hold the government to
22 those representations. I'm also going to note
23 that in the published Federal Register Notice of
24 Hearing, which is 87 -- it's 87 Federal Register
25 40167, there are two errors in your published

1 notice. The first is you have an incorrect phone
2 number.

3 The phone number 571-362-8188 is not
4 the phone number associated with the Office of
5 Administrative Law Judges. It is, as far as I
6 can tell, an employee of DEA who has nothing to
7 do with us or with you. So you might want to sort
8 that out, because that employee may get phone
9 calls and not know what to do with them.

10 The second thing, and this is more for
11 the interested parties, I have not set a
12 location. It says Crystal City, which is
13 currently where we are located. But it may
14 happen in nearby, a few blocks away at DEA
15 headquarters. That I will give everyone advance
16 on, but it's very close and so shouldn't -- if we
17 change places, it shouldn't be any inconvenience,
18 and the regulations do allow me to change the
19 location of the hearing without having to give
20 additional notice. We would just make sure that
21 if anyone showed here at Crystal City, they would
22 know where the proper place was to go. Just a
23 moment please.

24 (Pause.)

25 JUDGE WALLBAUM: All right. That's

1 all I have for the on the record hearing. Mr.
2 Dean, if there's anything else that the
3 government can represent to me about what
4 happened you may -- please do so. I am taking
5 away a couple of representations from you, and as
6 I said, I'm going to hold the government to it or
7 I'm going to consider the appropriate sanctions
8 for failure to do that.

9 So if there -- is there anything else
10 from the government about the topics I've
11 discussed on the record?

12 MR. DEAN: I have nothing further,
13 Your Honor.

14 MR. LOCHER: None, Your Honor.

15 JUDGE WALLBAUM: All right. Mr. Zorn,
16 anything that I've discussed on the record, do
17 you have any comments or questions.

18 MR. ZORN: Just two very short
19 comments. The first is your recollection is the
20 same as mine. I was at the informal status
21 conference and I recall and he stated as you
22 stated it. The second point is I heard the
23 government invoking privilege. I personally
24 question whether privilege can be invoked by a
25 waiver on the record.

1 We've had an off the record status
2 conference, because again he offered -- Mr.
3 Beerbower disclosed the substance of
4 communications with the Administrator's office.
5 The second point is I'm not sure that privilege
6 can be invoked when it's being used to disregard
7 a court order. I don't think the attorney-client
8 privilege protects those kinds of communications.

9 I have other matters, but they don't
10 relate to this topic. So I understand Your
11 Honor's purpose and the on the record status
12 conference, and I will save it until we get off
13 the record.

14 JUDGE WALLBAUM: Thank you. Mr.
15 Hunter, any other questions or comments from you
16 about the topic I discussed on the record?

17 MR. HUNTER: Yes Your Honor, briefly.
18 I agree with Mr. Zorn and with Your Honor as to
19 the factual representations regarding what Mr.
20 Beerbower at our informal conference. I heard
21 the remarks the same as Your Honor and Mr. Zorn
22 did. I also agree that what this case seems to
23 present is an instance of waiver, that Mr.
24 Beerbower directly relayed the substance of the
25 conversation that he had, and therefore the

1 communication itself and the attending
2 circumstances of that communication I don't think
3 are any longer covered by privilege.

4 I also expressed, I share the Court's
5 concern about this because especially given the
6 nature of these proceedings and the relationship
7 between Your Honor, the Administrator and the
8 agency itself, we have a fairly closed loop that
9 does not seem to provide an individual due
10 process safeguard for a problem like this, in
11 that the -- it appears that an ex parte
12 communication was had, and that ex parte
13 communication substance was to disregard an order
14 from Your Honor.

15 The agency is now claiming a privilege
16 that prevents the parties from being able to test
17 and understand the depths and extent of that
18 violation, and to the extent that any relief is
19 sought to rectify that problem, the party that
20 will receive the interlocutory appellate relief
21 on that question is the very party from whom this
22 ex parte communication was established.

23 And that seems to provide very little
24 independent review of whether an impropriety has
25 occurred here or not. As Your Honor has pointed

1 out, neither you nor the parties understand what
2 this was about, why it happened the way it did,
3 etcetera.

4 So those are my concerns, and based on
5 those concerns I would ask if the Court can make
6 a ruling about the claim of privilege that the
7 agency has raised today, and I would ask that the
8 Court overrule that claim of privilege and direct
9 the agency to provide the content of the
10 communication, and identify the individuals who
11 gave them these instructions.

12 JUDGE WALLBAUM: All right, thank you
13 Mr. Hunter. Do you have anything else?

14 MR. HUNTER: No Your Honor, that's it.

15 JUDGE WALLBAUM: Thank you. Mr.
16 Heldreth. Anything about what I discussed this
17 on the record conference?

18 MR. HELDRETH: Just briefly. I agree
19 with both Hunter and Zorn on this, and also I
20 directly heard the Administrator and the
21 Administrator's office mentioned by the DEA as
22 the people who were responsible for making
23 decisions. As I've said in previous motions that
24 I've had, I also believe there's a deep, deep
25 problem with the communication here, which shows

1 that there cannot be a fair hearing.

2 And based on this, we again are
3 appealing with the interlocutory appeals and plan
4 filing an appeal on the previous one with the
5 DEA, that the Administrator made. So we just
6 want to put that on record, that we can go to the
7 Appeals court on these issues, and agree that we
8 want the privilege motion or ruling to be made.
9 So thank you.

10 JUDGE WALLBAUM: Thank you. Mr. Dean,
11 what about the argument that Mr. Beerbower waived
12 any privilege on the government's behalf when he
13 disclosed twice that there had been this
14 communication? Don't you at a minimum have to
15 tell me who you communicated with? How is who
16 you communicated with covered by privilege even
17 if it did exist?

18 MR. DEAN: Well Your Honor, I guess
19 there's a couple of things to unpack here.
20 Whether Mr. Beerbower spoke inelegantly and said
21 the Administrator or even if the Administrator's
22 office is accepting it, we can't really get to
23 despite recollections because we don't have a
24 transcript and I was not there at the hearing.

25 JUDGE WALLBAUM: Everybody's in

1 agreement as to what was said, even Mr. Locher,
2 who was there. So I -- we proceed all the time
3 with off the record status conferences, and all
4 of the time we hold the parties, including
5 respondents, to state -- things that were said
6 during off the -- status conferences where there
7 was not a court reporter.

8 So that seems to be a well-established
9 process, that things said at a status conference
10 can be referenced subsequently in orders in these
11 proceedings.

12 MR. DEAN: Your Honor, yeah. That's
13 not what I was saying. But my point was if he
14 referenced both the Administrator and the
15 Administrator's office, we don't know what he
16 meant. I mean we can guess at what he's saying.
17 I think he spoke inelegantly. I think he meant
18 the Administrator's office. I think my
19 references to the front office have been fairly
20 clear. I made representations to you which
21 should allay many of the concerns that have been
22 raised here.

23 JUDGE WALLBAUM: Well, Administrator's
24 office includes the Administrator, and whether
25 that was elegant or inelegant, it still raises a

1 question that there have been communication with
2 people administrator-adjacent, as to these
3 proceedings.

4 (Simultaneous speaking.)

5 MR. DEAN: I think --

6 JUDGE WALLBAUM: I'm sorry?

7 MR. DEAN: I'm sorry, Your Honor. I
8 thought you were finished.

9 JUDGE WALLBAUM: I am, go ahead,
10 thanks.

11 MR. DEAN: I thought I had explained
12 previously that there are procedures in place so
13 that all those involved in issuing final
14 decisions, final orders are not the same people
15 who are contacted or had input into these matters
16 while they're active in litigation. So my
17 apologies to the extent that it wasn't clear, but
18 I thought I had made that point previously.

19 JUDGE WALLBAUM: What about the
20 argument that Mr. Beerbower waived any privilege
21 when he made that representation as to who he had
22 communicated with?

23 MR. DEAN: I think that would be a
24 fairly wrong assertion, because I am stating now
25 that -- and I stated to you previously that the

1 Administrator was not involved in that. I
2 believe that's what I had said, and I also said
3 that they had separate individuals being involved
4 regardless, from the front office involved in
5 reviewing this.

6 So to the extent that perhaps I'm --
7 I understand the gravity of the situation and
8 Your Honor's interest in making sure there's a
9 fair hearing, but I don't think that the fact
10 that Mr. Beerbower may have erroneously said
11 Administrator or Administrator's office when he
12 was referring to a collective group of
13 individuals, which I've been referring to as the
14 front office, waives any sort of privilege.

15 The agency may decide to disclose this
16 information to you, I don't know. But they may
17 not, and I think the agency's position at this
18 point is that it's internal deliberation, and you
19 have -- you have the agency's position, which is
20 evidenced in the scheduling notice that was
21 published, and my assurances to you on the record
22 that we've made throughout this hearing today.

23 JUDGE WALLBAUM: Mr. Dean, how does
24 deliberative process or attorney-client privilege
25 or work product, whichever privilege you want to

1 rely on, how does that protect the name of the
2 person who gave you the instruction? That's not
3 a content of the conversation. That's merely a
4 title or a name. How is that covered by
5 privilege?

6 MR. DEAN: Well first of all Your
7 Honor, I don't know specifically who it was, but
8 more generally I -- so I can't help you there.
9 But more generally, I think any sort of
10 individuals within the agency who are involved in
11 any sort of decision-making would not, would not
12 have to be named.

13 JUDGE WALLBAUM: You said earlier the
14 agency would have to decide whether or not to
15 provide that information. Is that still a
16 possibility, that the government could decide to
17 disclose that information in these proceedings,
18 as to who specifically provided that instruction?

19 MR. DEAN: I would have to speak with
20 the deputy chief counsel and chief counsel, to
21 see whether they would be willing to do that, or
22 the agency is willing to do that. I mentioned
23 it, so it is a possibility. Unfortunately, I
24 can't tell you more than that at this point.

25 JUDGE WALLBAUM: All right. Well I'll

1 let the government consider whether it wants to
2 do that, and wants to disclose anything else.
3 Obviously I have an obligation to provide a fair
4 hearing to the parties in this case.

5 I take that very seriously, and I've
6 heard your representation. But this will not
7 happen again without me being informed of it,
8 although if we come to the point again where me
9 being informed of it doesn't let me know who is
10 doing it, that may pose some of the same issues
11 that we have here right now.

12 But I'll close with saying that that's
13 something the government can discuss internally,
14 as to whether it wants to disclose additional
15 information on this matter, or not. There
16 obviously certain consequences associated with
17 not. Anything else, Mr. Dean?

18 MR. DEAN: No, Your Honor.

19 JUDGE WALLBAUM: All right, all right.
20 Thank you all very much.

21 MR. ZORN: May I just add something
22 quickly for the record?

23 JUDGE WALLBAUM: Yes, Mr. Zorn.

24 MR. ZORN: There's one thing that the
25 government said that actually bothers me, which

1 is they're for walling off certain people.

2 JUDGE WALLBAUM: I'm sorry Mr. Zorn,
3 if I could stop you right there. That last
4 portion was very garbled, so you might want to
5 restate it.

6 MR. ZORN: My apologies. Let me get
7 closer. The government said one thing that
8 bothered me, which was there's a procedure for
9 walling off certain people. The decision in this
10 case is made by the Administrator and to the
11 extent others are assisting her, or sorry the
12 final, obviously Your Honor makes the
13 recommendation.

14 To the extent there's any authority
15 for others to be involved, it is a delegation
16 from the Administrator. So this is not like a
17 situation in private practice where you have
18 multiple partners in a law firm and you can wall
19 them off from each other. This all goes to the
20 same decision-maker, and I think whoever was
21 involved in this decision, and this is also again
22 why who is involved actually matters, but whoever
23 was involved in this took a delegation from the
24 Administrator, and whoever is going to review the
25 final decision is delegated, whether it's the

1 Administrator herself or not.

2 But legally it has to be the
3 Administrator herself. So I don't think this
4 walling off process, to the extent there is
5 prejudice or bias and, you know, against the
6 interested party including my party has already
7 made that allegation. We cited Overton Park in
8 our papers. I'm not going to rehash old ground,
9 but that is not a procedure proposed by the
10 government, which I think has any legal basis
11 whatsoever. It all comes from the Administrator.

12 And then the other point I would note
13 is, and I understand Your Honor's order denying
14 our request for disclosure. I'm not here to
15 rehash that, but I have separately made FOIA
16 requests for judicial records. I would like the
17 carisoprodol proceedings. It's the only
18 precedent of recent memory. The agency is not
19 turning that over. I don't understand the walls
20 of secrecy that are involved in this, why you
21 can't get simple discovery from the agency.

22 But to me, this is kind of a
23 troublesome practice here of we can't seem to get
24 information, and the reason that relates to what
25 we're talking about is this was a notice of

1 hearing to allow the public to participate in
2 these proceedings. I don't understand how or why
3 it took them so long to do it. I'm not here to
4 rehash that, but I just don't want that to be
5 lost, as to why this was an important order that
6 Your Honor put out.

7 JUDGE WALLBAUM: Thank you Mr. Zorn,
8 and thank you Mr. Hunter and Mr. Heldreth. So
9 that for me concludes the on the record portion.

10 I know Mr. Zorn and perhaps others
11 wanted to address a few things, procedural
12 matters off the record. I will note that I will
13 receive a transcript of this hearing, of this
14 sorry, this status conference and I will
15 distribute that to the parties promptly upon my
16 receipt of that.

17 So if that's all, then we can at this
18 stage go off the record. Thank you.

19 (Whereupon, the above-entitled matter
20 went off the record at 1:57 p.m.)
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In the matter of: Scheduling of Five Tryptamines
Status Conference

Before: DEA

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